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No. 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Appellant

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF OF APPELLANT CHICAGO AND NORTH WESTERN RAILWAY COMPANY

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INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
QUESTION PRESENTED	2
STATEMENT	3
SUMMARY OF ARGUMENT	8
ARGUMENT	10
1. The Existence of I.C.C. Jurisdiction over Trackage Construction and Operations Involved in the Creation of new Interstate Interchange Connections and Through Routes is Established in *Alabama & Vicksburg Ry. Co.* v. *Jackson & E. Ry. Co.*, 271 U.S. 244	10
a. The Commission's Continuing Construction of Section 1(18) and the *Alabama* Decision Establishes the Jurisdiction Here	11
b. Since State Agencies and Courts Accept This Construction, Repudiation of the *Alabama* Doctrine Would Create a Regulatory No-Man's Land	12
c. The Legislative History of the Transportation Act of 1920 and Prior Decisions of This Court Require Commission Jurisdiction Over Interchanges Between Interstate Railroads of the Character Here Involved	13
2. The Role Assumed by the Court Below is Redundant and Destructive of a Proper and Efficient Relationship Between Federal Courts and Administrative Agencies	17
3. Although this Court's Decisions in *Powell* v. *United States* and *United States* v. *Idaho* have been largely Eroded, the Avoidance of Continuing Confusion would Warrant their being Overruled	29
CONCLUSION	31
APPENDIX A	1A

CASES CITED

PAGE

Alabama & Vicksburg Ry. Co. v. *Jackson & E. Ry. Co.*, 271 U.S. 244 ..... 9, 10, 11, 12, 13, 16

Board of Administration v. *Chicago, B. & Q. R. Co.*, 138 Kan. 720, 27 P. 2d 550 (1933) 13

Charleston & W.C. Ry. Co.-Construction, 166 I.C.C. 107 (1930) 12

Chicago, B. & Q. R. Co.-Abandonment, 267 I.C.C. 38 (1946) 12

Chicago, Rock Island & P. R.R. v. *Chicago and North Western Ry. Co.*, 188 F. Supp. 549 (S.D. Ill. 1960) .. 18

Chicago, Rock Island & P. R.R. v. *United States*, 205 F. Supp. 378 (N.D. Ill. 1962) 18

Citizens of Pipestone v. *Chicago, M. & St. P. R.R.*, 167 Minn. 174, 213 N.W. 534 (1926) 13

Construction by D.G.H. & M. Ry. 124 I.C.C. 338 (1927) 12

Construction by T.P. & W. R.R., 124 I.C.C. 278 (1927) 12

Great Southwestern R. Co.-Construction, 295 I.C.C. 829 (1958) 11

Guss v. *Utah Labor Relations Bd.*, 353 U.S. 1 13

I.C.C. v. *Oregon-Washington R. Co.*, 288 U.S. 14 14

Kansas City, M. & O. Ry. Co-Construction, 224 I.C.C. 157 (1937) 12

Long Island R.R. v. *New York Central R. Co.*, 281 F. 2d 379 (1960) 28

Lucas County Farm Bureau v. *Chicago, B. & Q. R.R.*, 209 I.C.C. 489 (1935) 12

Maritime Board v. *Isbrandtsen Co.*, 356 U.S. 481 22

Michigan Public Service Comm'n. v. *United States*, 162 F. Supp. 677 (N.D. Mich. 1958) 19

Nashville, C. & St. L.-Construction, 249 I.C.C. 363 (1958) 19

PAGE

New York Central Ry. Co. v. *Norfolk & W. Ry. Co.*, 214 F. Supp. 549 (S.D. W.Va. 1963) 19

Operation—Los Angeles & S.L. R.R., 124 I.C.C. 207 (1927) 12

Pennsylvania R. Co. v. *Reading Co.*, 132 F. Supp. 616 (E.D. Pa. 1955) 19

Piedmont & Northern Ry. Co. v. *Interstate Commerce Commission*, 286 U.S. 299 15

Powell v. *United States*, 300 U.S. 276 .....9, 29, 30

Public Service Commission of New York v. *United States* 56 F. Supp. 351 (S.D. N.Y. 1944) aff'd 323 U.S. 675 .....25, 26, 30

Re Quality Limestone Products, 16 P.U.R. 3d 205 (P.S.C. of Wisconsin 1956) 13

Shields v. *Utah Idaho R. Co.*, 305 U.S. 177 .....22, 27, 29, 30

State of Georgia v. *United States*, 156 F. Supp. 711 (N.D. Ga. 1957) 20

State of Illinois v. *United States*, 373 U.S. 378 ....24, 29, 30

Switching at Dubuque, Iowa, 210 I.C.C. 453 (1935) 12

Texas & N.O. R.R. v. *Northside Belt Ry. Co.*, 276 U.S. 475 15

Texas & Pacific Ry. Co. v. *Gulf, C.S.F. Ry. Co.*, 270 U.S. 266 .....17, 18

Toledo, P. & W. R.R. Trackage Rights, 307 I.C.C. 801 (1958) 11

United States v. *Drum*, 368 U.S. 370 .....29, 30

United States v. *Idaho*, 298 U.S. 105 .....9, 29, 30

United States v. *Jones*, 336 U.S. 641 27

United States v. *Pierce Auto Freight Lines*, 327 U.S. 515 30

Yonkers v. *United States*, 320 U.S. 685 .18, 21, 22, 24, 26, 30

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BRIEF OF APPELLANT CHICAGO AND NORTH WESTERN RAILWAY COMPANY

OPINIONS BELOW

The opinion of the District Court (R. 384-393)[1] is reported at 214 F. Supp. 244. The report of the Interstate Commerce Commission (R. 292-315) is printed at 307 ICC 311 and the Proposed Report by the Interstate Commerce Commission Examiner (R. 280-291) is unreported.

[1] The Transcript of Record herein is so identified.

JURISDICTION

The decree of the three-judge court (R. 393-396) was entered on June 18, 1963, and, after denial of post-trial motions by that court (R. 407-408), the Chicago and North Western Railway Company ("North Western") filed its notice of appeal (R. 408-411) in the district court on October 28, 1963. Probable jurisdiction was noted on March 9, 1964 (R. 411).

The jurisdiction of this Court rests on 28 USC 1253 and 2101(b).

STATUTES INVOLVED

The pertinent portions of Sections 1(18), 1(19), 1(20), 1(21), and 1(22) of the Interstate Commerce Act (49 USC 1(18-22) and are set forth in Appendix A to this brief.

QUESTION PRESENTED

After the Interstate Commerce Commission had affirmatively held that public convenience and necessity did not permit interconnection of the main lines of two Class I railroads at "Republic Junction," since it foresaw as a result of this interconnection potential preferences in divisions, car supply and other concessions to the most important shipper in the area, principal owner of one of those railroads, and certain harm by way of traffic division to existing railroads (R. 312-313) did the District Court exceed its function on review by examining the issue of I.C.C. jurisdiction *de novo* and by holding this subject "too small a matter to require the attention of the Interstate Commerce Commission?"

STATEMENT

This appeal involves a connection between two Class I railroads at "Republic Junction," Michigan (R. 97, Exs. 1 and 2)[2] built and placed in operation on October 21, 1957 without prior authority (R. 99). These railroads, Milwaukee[3] and LS&I,[4] had never before connected anywhere (R. 48 83, 106, 127, 209, 282, 294), so that there existed no through routes or joint rates for moving interstate rail commerce between them (R. 181, 19-20). Previously, rail cars originating at, or destined to, LS&I stations moved in interstate commerce via North Western or Soo Line.[5]

Soo Line immediately complained to the Interstate Commerce Commission ("the Commission") and ultimately lodged a formal complaint (in Finance Docket 20048) under Section 13 of the Interstate Commerce Act[6] (R. 16-21). As a result (R. 125), on March 27, 1958 Milwaukee and LS&I filed an application (in Finance Docket 20139 with the Commission requesting authority under Section 1(18) of the Interstate Commerce Act (49 U.S.C. 1(18)) to operate and interchange freight traffic[7] over the Republic Junction

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[2] Exhibits in the Commission proceeding are designated "Ex. ....."

[3] We so identify appellee Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

[4] We so identify appellee Lake Superior and Ishpeming Railroad Company.

[5] The Duluth, South Shore and Atlantic Railway Company, the original protestant here (R. 16-21) since then was renamed the Soo Line Railroad Company (R. 385).

[6] 49 U.S.C. 13.

[7] "Interchange" in railroad parlance means the transfer of cars between railroads of traffic moving over a through route.

connection (R. 24-27), together with a suggestion that the matter was not within the Commission's jurisdiction. Soon afterward (on April 9, 1958) Milwaukee and LS&I filed motions to dismiss their application (R. 28-33), suggesting various factual distinctions from similar circumstances in which trackage was held subject to the Commission's jurisdiction, notwithstanding the exemption of Section 1(22) of the Interstate Commerce Act (49 U.S.C. 1(22)).

A full hearing was held on the merits of the application (R. 93-224) and a considerable evidentiary record was taken (R. 225-279), which included (R. 105 and 106) the applicants' Applications (R. 24-27, 68-93) and their Return to Questionnaire (R. 37-68) filed previously with the Commission. North Western and Soo Line were permitted to intervene (R. 34, 35-36) and opposed the applications throughout. Undisputed on this record are the following facts:

1. Prior to the challenged construction, Milwaukee and LS&I had never connected anywhere (R. 48, 83, 106, 127 and 209), so that they had never interchanged traffic nor had they direct service or joint rates.

2. LS&I is controlled by the Cleveland Cliffs Iron Company, which owns over 75% of LS&I's common stock (R. 40, 125).

3. The construction was accomplished without notice to, or permission from the Commission (R. 16-23, 25, 125). Operations commenced on October 21, 1957 (R. 48, 124) between the main lines of Milwaukee and LS&I (R. 59).

4. The principal traffic moving over the Republic Junction interchange is forest products purchased from LS&I's parent (R. 43, 45, Ex. 5, 117, 126, 164, 170) Cleveland Cliffs Iron Co. ("Cleveland Cliffs") and shipped by rail to an industry located at Iron Mountain, Michigan (Ex. 7, R. 126, 127-128) although other

types of traffic also move (R. 126, 183-184, Ex. 5) and to other destinations (R. 115-116, Ex. 5, 116-121) both interstate and within Michigan (R. 338-339).

5. Prior to the connection, all of this traffic originating on LS&I to Iron Mountain moved via North Western (R. 126, 139, 156, 215). The principal shipper was entirely satisfied with the North Western and Soo Line service (R. 162), and even applicants knew of no complaints concerning the existing service (R. 110).

6. Rates paid by the shipping public are the same over this route, whether the service is performed by Milwaukee or North Western (R. 139, 169).

7. North Western provides rail service to Iron Mountain (R. 126, 120) which is competitive with that of Milwaukee (R. 134, 161).

8. All of the traffic now moving over the Republic Interchange could have been, and was in fact, handled by other railroads prior to October 21, 1957 (R. 45, 210-211, 217), and applicants expected no additional rail business to be generated by the new operation (R. 47, 83) and in fact the only new traffic generated in the territory came from an extension by LS&I at the other (east) end of its line (R. 133), not as a result of the Republic Junction connection.

9. The direct profit to applicants from the construction has been only incident to the elimination of intermediate carriers and dividing rates with those carriers for their services (R. 44). North Western and Soo Line are those intermediate carriers (R. 45, 126, 156, 160). They lost $664,866.44 in revenue up to March of 1960 over the new connection (R. 339).

10. The territory involved is one of very light traffic density (R. 139, 205) and the commodities moving there are all very low rated commodities (R. 128, 209). The comparative rates of return of the carriers involved demonstrate the importance of avoiding any

unnecessary diversion of revenues from North Western (Exs. 8, 9; R. 245-251).

11. The principal seller of forest products shipped over Republic Junction is LS&I's parent, Cleveland Cliffs (R. 154, 160, 176), and once the connection was established the rates from the Cleveland Cliffs shipping point, Sunrise Landing, were abruptly decreased (R. 130) to a level below that prevailing generally in the territory (R. 149-150), and LS&I at once began receiving revenue divisions from Milwaukee greater than it received from other connections (R. 140). Coincident with Cleveland Cliffs' financial interest in the entire transaction, then, the forest products traffic commenced moving over Republic Junction, so that North Western dropped to less than half of the traffic by the time of hearing (R. 211).

From this evidence the Commission's Examiner, having found (R. 280-291) that the Commission was empowered to rule on the merits, recommended approval, but, also, that Milwaukee and LS&I be prosecuted for constructing the connection prior to obtaining approval (R. 286), in violation of Section 1(18).

Division 4 of the Commission affirmed the violation, but found the interconnection incompatible with the public interest (R. 312-313).

The Commission's order was unambiguous. It held (R. 312-313):

> Since the record shows that a large number of shipments of saw logs and chemical wood have moved over the Republic Junction connection since its establishment in October 1957, whereas all that traffic formerly moved over the lines of other carriers in the area, it cannot be successfully contended that there has been no diversion of traffic as the result of the construction and use of the connection. Such diversion in this area of

light traffic density cannot help but be reflected in the earnings of the lines sustaining the loss and might well affect their ability to continue to provide as adequate a service in the area as was previously provided. Existing carriers providing an adequate service should be protected and strengthened against wasteful competition and duplication of services, since to weaken carriers by such methods would result in ultimate injury to the shipping public. *Texas & N.O.R. Co.* v. *Northside Belt Ry. Co.*, 276 U.S. 475.

Aside from the effect which use of the connection has had, or may have, upon established carriers in the area, it has resulted in a new competitive situation between carriers having connection with the Ishpeming so that the traffic is now subject to direct competition for its routing, and the Ishpeming, as the controlled subsidiary of Cleveland Cliffs, is in the position of being able to play one connection against another, thereby making it possible to provide Cleveland Cliffs a preference by way of concessions in divisions, car supply, or in other ways. Although there is nothing[8] of record to indicate that any of such abuses have occurred, it would not be consistent with the provisions of the act or with the public interest to grant a certificate of public convenience and necessity for a connection making them possible. Moreover, it is our opinion that the benefits which would inure to the two supporting shippers do not offset the detriment to established carriers in the area and to the general public that might result from operation of the connection. In the circumstances, the section 1(18) application should be denied, and the supplemental application under section 5 dismissed.

The three-judge court entered a preliminary injunction (R. 365-368) against effectiveness of the I.C.C. order on

[8] But cf. item 11, on pages 5-6 *supra*.

June 13, 1960; then after two pre-trial conferences, and several rounds of affidavits it received briefs and heard oral argument, finally enjoining the I.C.C. order some three years later, on June 18, 1963 (R. 393-396).

Thus, Milwaukee and Ishpeming have actually been operating for over six years under the injunctions below, an operation for which the I.C.C. Examiner recommended that they be prosecuted and which the Commission affirmatively found was contrary to the public interest and in violation of Section 1(18).

SUMMARY OF ARGUMENT

The Transportation Act of 1920 (41 Stat. 456 at 477-478, as amended 49 U.S.C. 1(18)-1(20)), established a broad scope of federal control over interstate railroad expansion and contraction. In general, apart from the express exceptions of Section 1(22) of the Interstate Commerce Act, the rule was established that no interstate railroad could expand its track facilities in a manner adversely affecting other carriers without an Interstate Commerce Commission determination that such expansion was consistent with public convenience and necessity.

The decisions of this Court and the Interstate Commerce Commission establish that construction involving new railroad connections and interchanges resulting in additional through routes, such as the connection at Republic Junction involved in this proceeding, require Commission authorization based on its findings of fact and conclusions of law. The three-judge court misapplied these decisions and held that the "jurisdictional issue" required *de novo* determination. Thereafter, based on its independent evaluation of certain aspects of the evidence (R. 384 at 388-391), that Court summarily concluded that the connecting track at

Republic "is too small a matter to require the attention of the Interstate Commerce Commission (R. 391)," and enjoined the Commission order for want of jurisdiction.

By substituting its own standards (R. 391-392) for the Commission's analysis (R. 292 at 311-313), the three-judge court exceeded the scope of review properly accorded Commission decisions.

To the extent that the "*de novo*" determination by the court below finds support in *Powell* v. *U.S.* and *U.S.* v. *Idaho,* it must be noted that these decisions have been largely eroded by later decisions, are no longer applicable, and could with propriety be overruled. Further, the jurisdiction of the Commission finds full support in *Alabama & Vicksburg Ry.* v. *Jackson & E. Ry.*, 271 U.S. 244, and numerous cases based on its doctrine.

ARGUMENT

1.

The Existence of I.C.C. Jurisdiction over Trackage Construction and Operations Involved in the Creation of new Interstate Interchange Connections and Through Routes is Established in Alabama & Vicksburg Ry. Co. v. Jackson & E. Ry. Co., 271 U.S. 244.

The question of I.C.C. power to determine the desirability of a new railroad interchange seems at first blush entirely resolved by this Court's decision in *Alabama & Vicksburg Ry. Co.* v. *Jackson & E. Ry. Co.*, 271 U.S. 244. There the court was compelled to construe the then-recent Transportation Act of 1920[9] to determine whether a new connection between the main lines of railroads engaged in interstate commerce was subject to I.C.C. jurisdiction under Section 1(18) Interstate Commerce Act or exempt, pursuant to Section 1(22). Holding the Section 1(22) exemption inapplicable (271 U.S. at 249-250) the Court explained clearly that:

> "The proposed junction is between the main lines of the two railroads. The point of junction is on the main line of the Alabama & Vicksburg, near its entrance into the City of Jackson. In support of the objection that a junction there would be dangerous, it was shown that the connection would be located between two trestles, near a highway crossing, on a curve, on a fill, and within the flood area of Pearl River. The establishment of the junction at that point would, if the objection is well founded, obviously imperil interstate commerce. The fact that it may do so, shows that the jurisdiction of the Commission over such connections must be exclusive, if the duty imposed upon it to develop and control an adequate system of interstate rail transportation is to be effectively performed. *Moreover, the establishment of junctions between the*

[9] See page 8, *supra*.

main lines of independent carriers is commonly connected with the establishment of through routes and the interchange of car services, and is often but a step toward the joint use of tracks. Over all of these matters the Commission has exclusive jurisdiction." (Italics supplied)

The italicized passage has been consistently construed as disposing to I.C.C. alone power over new interstate interchanges. The language permits no other construction.

a. *The Commission's Continuing Construction of Section 1(18) and the Alabama Decision Establishes its Jurisdiction Here.*

Since the *Alabama & Vicksburg* decision the Commission has uniformly taken jurisdiction of cases involving new connections between railroads, such as this, where new interchanges of traffic are involved.[10]

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[10] In *Toledo, P. & W. R. R.-Trackage Rights*, 307 I.C.C. 801 (1958) (not printed in full) North Western was held (over its motion to dismiss) to require a 1(18) certificate to operate (over 519.8 feet of track costing $25,468) a new interchange connecting its main line with that of T.P.&W., the Commission holding that "Our jurisdiction in proceedings such as this one is well settled. *Alabama Ry* v. *Jackson Ry.*, 271 U.S. 244."

Similarly, in *Great Southwestern R. Co.-Construction* 295 I.C.C. 829 (1958) (not printed in full) the Commission granted Rock Island a certificate to operate a new interchange over an existing track 1.79 miles long and granted Texas & Pacific authority to build and operate over ½ mile of track a new interchange. Over a motion to dismiss, based on Section 1(22) the Commission held (at page 3 of the mimeographed decision in F.D. 19786) that

> the proposed line of the Texas & Pacific will connect 2 common carriers subject to our jurisdiction and will provide a new route for transportation in interstate commerce, in which the Texas & Pacific will participate. It is our view that the con-

b. *Since State Agencies and Courts Accept This Construction, Repudiation of the Alabama Doctrine Would Create a Regulatory No-Man's Land.*

State courts and commissions agree too that a new interchange connection between the lines of interstate railroads lies within the sole power of the Interstate Commerce Commission under Section 1(18) as construed in *Alabama & Vicksburg* and that state commissions have no power to control such interchanges. The many decisions squarely in

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[10] *Continued*

struction and operation contemplated by the Texas & Pacific are within our jurisdiction. See *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244.

Likewise, in *Chicago, B.&Q. R. Co.-Abandonment,* 267 I.C.C. 38 (1946) the Commission took jurisdiction of Burlington's application to construct a connecting track to Great Western, less than ½ mile long (and costing $50,858.00) and granted authority under Section 1(18). So too was authority granted under Section 1(18) for track segments 390 feet and 402.5 feet in length to connect and permit interchange of traffic between Santa Fe system lines in *Kansas City, M.&O. Ry. Co.-Construction,* 224 I.C.C. 157 (1937), and in *Switching at Dubuque, Iowa,* 210 I.C.C. 453 (1935) did the Commission assert power to control interchange of traffic over industrial track less than ½ mile long. Next, in *Lucas County Farm Bureau* v. *Chicago, B. & Q. R.R.,* 209 I.C.C. 489 (1935) the Commission, denying a Section 1(18) application to cause Burlington and Rock Island to construct a new interchange held (at page 489) that:

> "In *Alabama & V. Ry. Co.* v. *Jackson & E. Ry. Co.,* 261 U.S. 244, the Supreme Court of the United States held this Commission has exclusive jurisdiction to determine whether junctions may be established between the main lines of two railroads, both engaged in interstate commerce."

Identical in this respect also are *Charleston & W.C. Ry. Co.-Construction,* 166 I.C.C. 107 (1930) (where, over a motion to dismiss on jurisdictional grounds, the Commission sustained its jurisdiction under Section 1(18) to rule upon public need for a proposed 2 mile interchange between the lines of the two applicant railroads) and *Construction by D., G.H. & M. Ry.,* 124 I.C.C. 338 (1927); *Operation-Los Angeles & S.L. R.R.,* 124 I.C.C. 207, 211 (1927); and *Construction by T.P.&W. R.R.* 124 I.C.C. 278 (1927).

point are *Re Quality Limestone Products,* 16 P.U.R. 3d 205 (P.S.C. of Wisconsin 1956); *Board of Administration* v. *Chicago, B. & Q. R. Co.,* 138 Kan. 720, 27 P. 2d 550, 552 (1933); *Citizens of Pipestone* v. *Chicago, M. & St. P. R.R.,* 167 Minn. 174, 213 N.W. 534, 535-536 (1926), the latter an opinion on reconsideration, reversing a prior decision upon the basis of this Court's then recent decision in *Alabama & Vicksburg.* The high Minnesota court explained (213 N.W. at 535-536) that:

> "As we read this latest utterance of the Supreme Court, the compelling of a junction between two railroads, carriers of interstate commerce, so that cars may be transferred or routed from one to the other, as was petitioned for in the case at bar, comes within the sole jurisdiction of the Interstate Commerce Commission. We are unable to see any substantial difference in the situation presented here from that which existed in *Alabama & Vicksburg Ry. Co.* v. *Jackson & Eastern Ry. Co., supra.*"

Thus, sustaining appellees' contention here would carve out from the otherwise complete regulation of railroads a no-man's-land comparable to that rejected here in *Guss* v. *Utah Labor Relations Bd.,* 353 U.S. 1, 10-12; and a lack of control completely contrary to the regulatory regime which Congress thought that it had enacted in the Transportation Act of 1920.[11]

c. *The Legislative History of the Transportation Act of 1920 and Prior Decisions of This Court Require Commission Jurisdiction Over Interchanges Between Interstate Railroads of the Character Here Involved.*

The District Court (R. 390) clearly erred in seeking to avoid the *Alabama & Vicksburg* decision by noting that the

[11] See page 8, *supra.*

applicants here did not extend their lines to a new terminus, so that there could [therefore] be no "extension" sufficient to activate Section 1(18). We submit that the test laid down by this Court and followed here by the Commission is not so simple.

First, this Court made it quite clear in *I.C.C.* v. *Oregon-Washington R. Co.*, 288 U.S. 14 at 39, that

> an extension, though something other than a team, switching, industrial or side track, need not, in order to be distinguished therefrom, be a building into a new and previously unserved locality.

Thus, where an electric railroad (arguably also exempt by Section 1(22) from I.C.C. regulations) proposed construction of a connection which would have "become a connecting link in the new through route and effective line of connecting carriers which would be strongly competitive with existing trunk lines,"[12] in order to handle "pre-eminently interchange interstate freight traffic national in character,"[13] this Court held:

> The petitioner's railway is of such importance in interstate commerce and renders a service so predominantly devoted to the handling of interstate freight in connection with steam railroads, is in such relation to connecting steam carriers, and competes with steam trunk lines in such manner, that in view of the declared policy of the act we cannot hold it an "interurban" railway within the exemption of the same paragraph. The Transportation Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason exemptions from it sweep should be narrowed and limited to effect the remedy intended.

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[12] 286 U.S. 299, at 310.

[13] 286 U.S. 299, at 311.

Piedmont & Northern Ry. Co. v. *Interstate Commerce Commission*, 286 U.S. 299, 311, 312.

The Commission here carefully considered these competitive aspects, citing and guided by the leading decision in *Texas & N.O. R.R.* v. *Northside Belt Ry. Co.*, 276 U.S. 475, where this Court restated once again (at page 479) that:

> The purpose of paragraphs 18 to 22 is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest. See *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R.R. Co.*, 257 U.S. 563; *The Chicago Junction Case*, 264 U.S. 258; *Railroad Commission of California* v. *Southern Pacific Co.*, 264 U.S. 331; *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266; *Alabama & Vicksburg Ry. Co.* v. *Jackson & Eastern Ry. Co.*, 271 U.S. 244.

This point is made emphatically in the legislative history of the 1920 Act.[14]

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[14] Mr. Esch, Chairman of the Commerce Committee and Manager in the House of H.R. 10453, which became the Transportation Act of 1920, explained (58 Cong. Rec. 8318) that "We can get better service by strengthening the existing line than by creating a rival or parallel line which would diminish the ability of the first line to make further improvements and betterments." And the SENATE-HOUSE CONFERENCE REPORT, H. Rep. 456 (66th Cong., 1st Sess.) stated clearly at page 18 that:

> "Section 402 further provides that extensions of an existing railroad or the construction of a new line, or the abandonment of a line shall not be permitted unless and until there shall have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction or abandonment. A like provision can be found in the statutes of a number of States. Your committee believes that the requirement of such a certificate, so far as extensions are concerned, will tend to stabilize existing conditions and prevent the construction of unnecessary or parallel lines which, without any reasonable hope of profitable operation, would become a burden to the public."

A further basic analytic error is the District Court's assertion (R. 390) that the *Alabama & Vicksburg* decision involved in addition to the proposed connection, an additional operation to a new terminus. This Court in that case had no such issue before it. It made perfectly plain (271 U.S. at p. 245) that the only such application had been *withdrawn* long before the connection case arose, and that trackage rights or no,

> the establishment of junctions between the main lines of independent carriers is commonly connected with the establishment of through routes and the interchange of car services, and is often but a step toward the joint use of tracks. Over all of these matters the [Interstate Commerce] Commission has exclusive jurisdiction.
>
> *Alabama & Vicksburg Ry. Co.* v. *Jackson Ry. Co.*, 271 U.S. 244, 250.

Thus this Court's construction of Section 1(18) in just this context, holding that new interchanges between interstate railroads are subject to Commission jurisdiction and regulation should have been decisive here. All elements of the *Alabama & Vicksburg* decision were here present, as the Commission noted (R. 286). The record shows unequivocally that this was a brand new interchange between interstate railroads (R. 48, 83, 106, 127 and 209) which had never before connected anywhere (*ibid.*), new through routes on interstate traffic were thereafter established (R. 181, 183-185), and joint use of the involved tracks (R. 59) was involved from the beginning (R. 51-53, 79, 107-109). But for the District Court's erroneous application of the *Alabama* decision, Commission jurisdiction here would have been sustained.

2.

The Role Assumed by the Court Below is Redundant and Destructive of a Proper and Efficient Relationship Between Federal Courts and Administrative Agencies.

Appellees, in support of a *de novo* review, assert (at page 9 of their Motion to Affirm here—No. 710 in the prior term) that:

> The issue in a section 1(20) proceeding is identical to the issue decided by the District Court herein.

To appraise the administrative waste inherent in this assertion, we must first review briefly the respective roles of agency and reviewing court in the area of railroad expansion, as established by Congress in 1920. Interstate railroads are prohibited from extending their lines or carrying on additional operations without a certificate from the Commission that public convenience and necessity permit the construction or operation. Section 1(18). After following the procedures laid down in Section 1(19), the Commission is empowered to grant such a certificate by Section 1(20), and, by the same provision, a federal court is empowered to enjoin construction or operation by a carrier which has not obtained such a certificate.[15]

If the carrier attempts such extension or operation without I.C.C. authority, the district courts are empowered by Section 1(20) to issue an injunction to compel a carrier to seek Commission approval, *Texas & Pacific Ry. Co.* v. *Gulf, C. & S.F. Ry. Co.*, 270 U.S. 266. In doing so, the court

[15] The only exception to this provision is contained in Section 1(22) of the Act, exempting from Commission supervision "spur, industrial, team, switching or side tracks, located or to be located wholly within the State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

is required to determine in the first instance whether the action proposed by the carrier constitutes an "extension" under the teaching of *Texas & Pacific, supra.* The carrier may, of course, ultimately seek I.C.C. authority, as Milwaukee and L.S. & I. did here, in which case it is the duty of I.C.C. to determine affirmatively its jurisdiction over the transaction. *Yonkers* v. *United States,* 320 U.S. 685. The question then presented is what weight should a reviewing court accord I.C.C.'s finding of jurisdiction? The court below held that I.C.C.'s determination was incidental (R. 388) and tried the issue *de novo,* agreeing with appellees Milwaukee and L.S. & I. in their Motion to Affirm here,[16] that "[t]he issue in a section 1(20) proceeding is identical to the issue decided by the District Court herein."

But as this Court's decisions noted above show, the issue in a Section 1(20) case is whether a proposed construction program or operation has sufficient obvious earmarks of competitive or financial significance that a single judge should refer the matter to the Commission—elements so gross as to have no place in a proceeding to review a final Commission order.

A brief footnote illustration of the actual practice under Section 1(18) will best indicate what is now done.[17]

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[16] Motion to Affirm in No. 710 in the October, 1963 Term, at page 9.

[17] In *Chicago, Rock Island & P. R.R.* v. *Chicago and North Western Ry. Co.,* 188 F. Supp. 549 (S.D. Ill. 1960) defendant sought to build a 1.3 mile section of track to an industry near Peoria, Illinois, in a section served also by the plaintiff. Holding the competitive consequence of the proposed construction to be inconsistent with any "industry spur" contention (*id.* at 553) the court enjoined further construction pending issuance of a Commission certificate. When that certificate was ultimately issued, the same plaintiff sought review of the order in another court, this time one composed of three judges, pursuant to 28 U.S.C. 1336. *Chicago, Rock Island*

Thus the apparently elaborate tests stated by the one-judge courts[18] faced with the issue under Section 1(20) of whether to refer a case to the I.C.C. (i.e.—Will more that one industry be served? Will there be passenger or express service? Will there be a station, with or without telephone or telegraph service?) are really restatements of the Commission's Return to Questionnaire (R. 38-49). They are, if the Court please, the most rudimentary elements of the public importance—they are the basic grist from which the Commission must determine the impact upon carrier competitive and financial relations and, ultimately, whether public considerations permit the proposed operation. But the Commission's task under Section 1(18) is more complex than that of the single federal judge under Section 1(20). As the Commission recently restated (in *Nashville, C. & St.L.—Construction*, 295 I.C.C. 363 (1958)):

> Questions relating to jurisdictional matters of the nature raised by the applicant in this proceeding have been considered and discussed in numerous cases decided by us and by the courts. None of them prescribes any concrete rules or formulas whereby a line of railroad partaking of the nature of a spur, indus-

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[17] *Continued*

& P. R.R. v. *United States*, 205 F. Supp. 378 (N.D. Ill. 1962). Refusing to try the matter *de novo* (*id.* at 383), that court upheld the Commission order after determining (*id.* at 384) that the order was reasonable and supported by substantial evidence, the customary scope of review in such cases. Note further that other courts have found it impossible to intervene by enjoining I.C.C. hearings under Section 1(18) where a party contends against the Commission's jurisdiction, holding that until the Commission has determined, after hearing, whether it possesses power in the premises it would be improper for the courts to attempt to decide the jurisdictional issue. *Michigan Public Service Comm'n.* v. *United States*, 162 F. Supp. 677 (W.D. Mich. 1958).

[18] E.g., *Pennsylvania R. Co.* v. *Reading Co.*, 132 F. Supp. 616, 621-622 (E.D.Pa. 1955); *New York Central Ry. Co.* v. *Norfolk & W. Ry. Co.*, 214 F. Supp. 549, 553 (S.D. W.Va. 1963).

> trial, or switching track, may be easily distinguished from an extension of a line of railroad. The line of demarcation between them has been closely drawn in many instances, and the question of our jurisdiction has been determined in the light of the factors peculiar to each individual case. These include, among other things, matters pertaining to the purpose of the track sought to be constructed and the use to be made of it; the question whether new routes in interstate commerce would be established through the use of such track; and whether the construction and operation of the proposed track would constitute an invasion of another carrier's territory.

Reviewing the Commission's decision there, after it determined affirmatively on the jurisdictional question, the three-judge reviewing court in *State of Georgia* v. *United States,* 156 F.Supp. 711 (N.D.Ga. 1957) was seemingly uncertain at first of the scope of review to be accorded the jurisdictional finding (156 F.Supp. 713). Nevertheless, in an opinion affirmed here (356 U.S. 273), the court held (156 F.Supp. at 717):

> We think it clear that if the proposed construction offers a substantial threat in a "preservation of the earning capacity, and conservation of the financial resources" of either the proponent of the new trackage or of the existing carrier it may become "a matter of national concern"; if there is a substantial doubt that "the property employed" (and this must mean the property employed by both the new and the old carriers) will "earn a reasonable return," or that it constitutes an unneeded duplication and that "the building of unnecessary (i.e., duplicating) lines involves a waste of resources" whose burden may fall upon the public"; and if the type of competition that would result "may result in harm to the public as well as in benefit," or that the injury to its rival may cause the public ultimately to bear the loss then the Act

> sought, among other things, to avert such results. This is the clear teaching of the *Texas & Pacific* case.
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> Although these findings were made by the Commission in connection with the merits of the application for certificate of convenience and necessity they stand in the record for whatever purpose they may serve on the jurisdictional question as well.

These questions, we respectfully submit, are of a quality quite different than those in the Return, and those in a Section 1(20) injunction case. And upon these issues of transportation economics the courts ought properly to defer to the Commission's refined resolution issues as to which judges, by virtue of their training and experience, can hardly be deemed more knowledgeable. By seizing on a "jurisdictional" issue to displace the Commission's findings and judgment, the District Court exceeded the proper bounds of judicial review. We think its action here incompatible with this Court's decision in *City of Yonkers* v. *United States,* 320 U.S. 685, for the Court there made it plain that an I.C.C. order under Section 1(18) could not be sustained without an express finding by the agency that it had jurisdiction over the line in question. The decision is unequivocal, the Court declaring (320 U.S. at 689, 691-692) that:

> ". . . we deem it essential in cases involving a review of orders of the Commission for the courts to decline to make that determination without the basic jurisdictional findings first having been made by the Commission."
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> • • •
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> "The insistence that the Commission make these jurisdictional findings before it undertakes to act not only gives added assurance that the local interests for which Congress expressed its solicitude will be safeguarded.

> It also gives to the reviewing courts the assistance of an expert judgment on a knotty phase of a technical subject."
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> • • •
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> "This is not to insist on formalities and to burden the administrative process with ritualistic requirements. It entails a matter of great substance. It requires the Commission to heed the mandates of the Act and to make the expert determinations which are conditions precedent to its authority to act."

Unless, to paraphrase Mr. Justice Frankfurter, "[t]he agency is made to serve as a circumlocution office."[19] the *Yonkers* decision is positively repugnant to the lower decision here. Indeed, more recent decisions point clearly toward acknowledging the Commission's role in such determinations by limiting review of these "jurisdictional" fact findings to the review normally accorded administrative agencies. Clearly in point on this precise issue is *Shields* v. *Utah Idaho R. Co.*, 305 U.S. 177, where I.C.C. had determined that the subject carrier was not within the "interurban" exemption of Section 152, Eighth of 45 U.S.C., and thus subject to federal regulation of its employment practices. After the three-judge district court had tried the jurisdictional issue *de novo*, this Court reversed, holding that it had exceeded the permissible scope of review of the I.C.C. order. Unambiguous, indeed, is this decision (305 U.S. at 184-185):

> "What is the scope of the judicial review to which respondent is entitled? As Congress had constitutional authority to enact the requirements of the Railway Labor Act looking to the settlement of industrial disputes between carriers engaged in interstate commerce and their employees, and could include or except inter-

[19] *Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 518 (Frankfurter, J., dissenting, joined by Justices Burton and Harlan).

urban carriers as it saw fit, no constitutional question is presented calling for the application of our decisions with respect to a trial *de novo* so far as the character of the respondent is concerned. With respect to that question, unlike the case presented in *United States* v. *Idaho,* 298 U.S. 105, where the Interstate Commerce Commission was denied the authority to determine the character of the trackage in question (id., p. 107), the Commission in this instance was expressly directed to make the determination. As this authority was validly conferred upon the Commission, the question on judicial review would be simply whether the Commission had acted within its authority. *Interstate Commerce Comm'n* v. *Union Pacific R. Co.,* 222 U.S. 541, 547; *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.,* 227 U.S. 88, 91; *Virginian Railway Co.* v. *United States,* 272 U.S. 658, 663; *Tagg Bros. & Moorhead* v. *United States,* 280 U.S. 420, 444; *Florida* v. *United States,* 292 U.S. 1, 12; *St. Joseph Stock Yard Co.* v. *United States, supra.*

The condition which Congress imposed was that the Commission should make its determination after hearing. There is no question that the Commission did give a hearing. Respondent appeared and the evidence which it offered was received and considered. The sole remaining question would be whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious. *Id.* That question must be determined upon the evidence produced before the Commission. [footnotes omitted]."

• • •

"We conclude that the District Court erred in permitting a trial *de novo* of that issue and that the determination of the Commission was within its authority validly exercised. The decree of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court with direction to dismiss the bill of complaint."

A significant number of three-judge district courts have now been persuaded that this Court meant what it said in *Yonkers,* and that since an I.C.C. finding of jurisdiction is mandatory in a 1(18) case, it should be accorded the weight on review which is customarily accorded administrative determinations. Most recently, in *State of Illinois* v. *United States* 373 U.S. 378, the Court affirmed summarily the decision of a three-judge court which, following *Yonkers,* had held (213 F. Supp. 83 at 88) that:

> "The opinion [in *United States* v. *Idaho,* 298 U.S. 105] by Justice Brandeis, while acknowledging that the district court had jurisdiction to determine the classification of the Oregon railroad, did not deny that the determination of the Commission should be given great weight. It merely concluded that the ultimate decision was left to the courts and not to the Commission.
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> In *City of Yonkers* v. *United States,* 320 U.S. 685, 64 S.Ct. 327, 88 L.Ed. 400 (1943), the Supreme Court was again called upon to review the findings of a district court in determining whether certain operations of the New York Central fell under the exception of Section 1(22). Although agreeing with Justice Brandeis that the determination of what is included within the exemption of Section 1(22) involves a 'mixed question of fact and law,' the Court nevertheless concluded that the Commission should first determine whether the railroad falls within its jurisdiction. In recognizing the importance of the Commission's findings, the Court said at pages 691-692, 64 S.Ct. at pages 330-331:
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> > 'It is hardly enough to say that the Commission's orders may be set aside by the courts where the Commission exceeds its authority. The Commission had a special competence to deal with the transportation problems which are reflected in these questions. The Congress has entrusted to the Commission the initial responsibility for de-

termining through application of the statutory standards the appropriate line between the federal and state domain. * * * The insistence that the Commission make these jurisdictional findings before it undertakes to act not only gives added assurance that the local interests for which Congress expressed its solicitude will be safe-guarded. *It also gives to the reviewing courts the assistance of an expert judgment on a knotty phase of a technical subject.*

* * *

'This is not to insist on formalities and to burden the administrative process with ritualistic requirements. It entails a matter of great substance. It requires the Commission to heed the mandates of the Act and to make the expert determinations which are conditions precedent to its authority to act.' (Emphasis supplied.)

The case was remanded and the Commission held that it had jurisdiction after it had made detailed subordinate findings of fact. The district court affirmed, *Public Service Commission of New York* v. *United States, D.C.*, 56 F.Supp. 351, and on review the Supreme Court sustained, 323 U.S. 675, 65 S.Ct. 130, 89 L.Ed. 548 (1944). The Court stated at page 675, 65 S.Ct. at page 130:

'On remand of the case * * * to the Interstate Commerce Commission for further findings, the Commission reopened the case, took further evidence, and made additional findings. Upon examination of the case now here on appeal we conclude that those findings are sufficient to support the order, and the evidence is sufficient to support the findings. The judgment is affirmed.'

We think these two Supreme Court opinions settle the question of the scope of judicial review so that we may conclude that although this court is not bound by the determinations of the Commission and that the doc-

trine of 'substantial evidence' is not specifically applicable, nevertheless great weight must be given to the determination of the Commission in an order such as this in which its special competence is clearly recognized [emphasis supplied]."

That the district court in *Yonkers* likewise so understood the Court's remand opinion is clear from its second opinion on review of the second I.C.C. order, *sub nom. Public Service Com'n. of New York* v. *United States*, 56 F.Supp. 351 (S.D. N.Y. 1944), affirmed *per curiam* 323 U.S. 675. The district court read the *Yonkers* opinion as entitling the I.C.C. jurisdictional finding to "at least prima facie weight."[20]

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[20] At page 353 of 56 F. Supp. the Court explained that:

"In the light of these previous proceedings, the crucial question before us is, of course, the jurisdiction of the Commission to enter the abandonment order."

* * *

"Such findings, both subordinate and ultimate, surely meet the criticisms of the previous order by the Supreme Court; and, since they were the express objective of the Supreme Court's order of reversal, they must be entitled to at least prima facie weight in our considerations here.
Actually, the effect to be given by the courts to administrative findings of 'jurisdictional facts' is not clear, as, indeed, the majority and minority opinions rendered by the Supreme Court in the present proceedings show."

* * *

"Where, as here, a court is asked to review an order of the Commission issued upon application for a certificate of public convenience and necessity under § 1(18), the initial validity of which is premised upon the existence of basic jurisdictional findings by the Commission, there must of necessity be some amelioration of the doctrine that the question of jurisdiction is for the independent judgment of the court. Otherwise it would hardly have been necessary to return the case for such findings. Indeed, in the light of at least some precedents, we were coming to think that review of 'jurisdictional' and 'constitutional' facts was more limited than had earlier been thought. *Gray* v. *Powell*, 314 U.S. 402, 62 S.Ct. 326, 86 L. Ed. 301; *Shields* v. *Utah Idaho Central R. Co.*, 305 U.S. 177, 59

That these cases are not unique aberrations in this Court's doctrine of judicial review is revealed by its decision in *United States* v. *Jones*, 336 U.S. 641, 664, where it alludes to *Shields*, a keystone of our position, as foundation for "the general rule which gives administrative determinations in such matters presumptive weight (336 U.S. at 664)." This rule, we contend, should have been applied here, where I.C.C. twice ruled affirmatively upon its jurisdiction over the extended line[21] only to have its efforts sloughed off as "incidental".

Undeterred by the verbalism of "jurisdictional fact," we submit that the essential issue is whether this interchange connection raises an issue of national import involving the substance of Section 1(18)—if so, the Commission correctly intervened. The Commission held (R. 298, 312-313) that this connection did raise issues of national transportation significance; it reiterated that view explicitly to the District Court below (R. 398-404 at 404)[22] and in this Court the Solicitor General advances in that position (Memorandum for the United States and the Interstate Commerce Commission in No. 710 of the prior term at pages 5-7).

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[20] *Continued*

S.Ct. 160, 83 L.Ed. 111; *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 73, 56 S.Ct. 720, 80 L.Ed. 1033; *Steamship Terminal Operating Co.* v. *Schwartz*, 2 Cir., 140 F. 2d 7; Brown, Fact and Law in Judicial Review, 56 Harv. L. Rev. 899, 925; Landis, The Administrative Process, 1938, 126-135; 41 Yale L.J. 1037; 46 Harv. L. Rev. 478; 80 U. of Pa. L. Rev. 1055; 22 Corn.L.Q. 515."

[21] R. 284-286, 296-299. Indeed, so clear was this issue to the Examiner, that he recommended that the matter be referred to the appropriate U.S. Attorney to prosecute Milwaukee and L.S. & I. for failure to obtain approval for this operation (R. 286).

[22] The Commission and the United States stated:

We submit, contrary to the Court's statement.... the matter in question is of national concern (R. 404).

Judge Friendly, of the Second Circuit, in a recent opinion on this same point resolved this question in *Long Island R.R.* v. *New York Central R. Co.*, 281 F.2d 379 (1960). His reasoned ruling (*id.* at 383-384) is worthy of quotation:

> Appellants argue this administrative construction should not receive its customary weight because of the holdings, cited above in our discussion of the jurisdiction of the District Judge, that under § 1(20) the enjoining of extensions or abandonments which the Act prohibits without a certificate is for the courts rather than the Commission. However, it hardly follows from this that Congress would not wish the courts to give appropriate heed to a long-standing and consistent interpretation by the Commission in the discharge of duties confided to it. Section 1(18) cannot be deemed wholly forbidden ground to the Commission. Often the Commission must construe and apply § 1(18) directly, as it would have had to do here if the Central has petitioned for a certificate and then moved to dismiss the petition for want of jurisdiction, see *Lehigh Valley R.R. Conditional Sale Contract*, 233 I.C.C. 359 (1939); *Davidson Transfer and Storage Co. First Mortgage*, 282 I.C.C. 521 (1952). And, despite some of Mr. Justice Butler's language in *Powell* v. *United States, supra*, we cannot believe the Commission is under a mandate to remain mute in an investigation and suspension proceeding as to whether the tariff contemplates action which the Commission believes it will be bound to seek to enjoin under § 1(20). So far as concerns the relative roles of court and Commission, we see little distinction between § 1(18) and § 20a, relating to the issuance of securities. There also decision whether Commission authorization is needed is ultimately for the courts in civil or criminal proceedings, but weight has been given not only to positive administrative construction, *United States* v. *New York, New Haven & Hartford R.R.*, 2 Cir., 1959, 276 F.2d 525, 530-31, certiorari denied. *Tri-Continental Financial*

Corp. v. *U.S.*, 1960, 362 U.S. 961, 80 S.Ct. 877, 4 L.Ed. 2d 876 but also to long-standing administrative inaction, *United States* v. *Chicago North Shore & Milwaukee R.R.*, 1933, 288 U.S. 1, 53 S.Ct. 245, 77 L.Ed. 583.

His reference to Section 20a and the *North Shore* case (of 288 U.S.) recalls this Court's resolution of the *Shields* case[23] and the more recent *North Shore* case (373 U.S. 378),[24] sustaining I.C.C.'s jurisdictional findings upon the review customarily accorded agencies in reviewing courts. These recent decisions, testing whether the agency decision comports with the body of administrative and judicial precedents so far developed in this area, themselves harmonize with this Court's recent expressions in this area,[25] and promote the most constructive accommodation between agency and Court in an exceedingly complex area of economic regulation.

3.

Although this Court's Decisions in Powell v. United States and United States v. Idaho have been Largely Eroded, the Avoidance of Continuing Confusion would Warrant their being Overruled.

Candor requires recognition of two incompatible lines of decisions by this Court, one holding that the issue of I.C.C. jurisdiction over extension or abandonment of rail line is a "mixed question of law and fact," susceptible of *de novo* determination in a reviewing court;[26] the second, holding that the I.C.C. must determine its jurisdiction in a case in-

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[23] Pages 22-23, *supra*.

[24] See pages 24-26, *supra*. The latter "North Shore" case, of course, was captioned *State of Illinois* v. *United States*.

[25] E.g., *United States* v. *Drum*, 368 U.S. 370 at 376 and 385-386.

[26] *United States* v. *Idaho*, 298 U.S. 105; *Powell* v. *United States*, 300 U.S. 276.

volving railroad expansion or contraction,[27] and that this Commission determination is entitled to presumptive weight on review, which review is limited to testing the adequacy and sufficiency of the Commission findings.[28] The former line of these decisions could appropriately be overruled, in the interest of conserving judicial and administrative resources and establishing a greater semblance of harmonious interplay between the courts and regulatory agencies whose activities they review. The court below followed the former line of cases, by determining *de novo* the issue of I.C.C. jurisdiction over the rail construction in issue, a holding incompatible with the more recent and, we submit, better reasoned decisions of this Court.

Both *Powell*[29] and *Idaho*,[30] *supra*, appear to hold that I.C.C. has no power to determine its jurisdiction over a proposed extension or abandonment, that instead this is a "mixed question of fact and law" upon which the court, not the Commission, must speak. Both cases involved review of I.C.C. determinations, and in both the jurisdictional issue was determined *de novo*. The conflict seems clear.

But this "law-fact" formula has long since been discarded,[31] and the *Powell-Idaho* doctrine, we submit, cannot be held to have survived the decisions from *Yonkers* through *Drum* noted at pages 21-29, *supra*. For this reason,

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[27] *Yonkers* v. *United States*, 320 U.S. 685.

[28] *Shields* v. *Utah Idaho R. Co.*, 305 U.S. 177; *State of Illinois* v. *United States*, 213 F. Supp. 83 (N.D. Ill., 1962), aff'd. 373 U.S. 378; *Public Service Com'n. of New York* v. *United States*, 56 F. Supp. 351 (S.D. N.Y. 1944), aff'd. 323 U.S. 675.

[29] 300 U.S. 276 at 287-288.

[30] 298 U.S. 105 at 109.

[31] *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515; *United States* v. *Drum*, 368 U.S. 370, 376; 4 Davis, *Administrative Law Treatise* §§ 30.01-30.11.

a proper recognition of present doctrine would warrant that the *Powell* and *Idaho* decisions be overruled.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, with instructions that the complaint be dismissed.

Respectfully submitted,

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